

² Appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedures* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Administration (SSA) age-related retirement benefits for the period June 1, 2006 through September 12, 2020, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$1,800.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On September 27, 2004 appellant, then a 60-year-old mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained lumbar intervertebral disc displacement and radiculopathy at L5-S1 due to factors of his federal employment. OWCP accepted his claim for lumbar disc displacement at L5-S1 with radiculopathy. It paid appellant wage-loss compensation on the supplemental rolls as of February 20, 2005 and on the periodic rolls commencing June 12, 2005.

On July 9, 2020 OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculations form to SSA to determine whether an offset of benefits was required.

On August 12, 2020 SSA completed the SSA dual benefit calculation transmittal form setting forth appellant's SSA rate with FERS and without FERS commencing June 2006. With FERS, appellant was entitled to the following monthly rates: \$1,002.20 effective June 2006; \$1,035.30 effective December 2006; \$1,059.00 effective December 2007; \$1,485.70 effective May 2010; \$1,485.70 effective December 2010; \$1,539.10 effective December 2011; \$1,565.20 effective December 2012; \$1,588.60 effective December 2013; \$1,615.60 effective December 2014; \$1,615.60 effective December 2015; \$1,620.40 effective December 2016; \$1,652.80 effective December 2017; \$1,699.00 effective December 2018; and \$1,726.10 effective December 2019. Without FERS, he would have been entitled the following monthly rates: \$883.30 effective June 2006; \$912.40 effective December 2006; \$933.30 effective December 2007; \$987.40 effective May 2010; \$987.40 effective December 2010; \$1,022.90 effective December 2011; \$1,040.20 effective December 2012; \$1,055.80 effective December 2013; \$1,073.70 effective December 2014; \$1,073.70 effective December 2015; \$1,076.90 effective December 2016; \$1,098.40 effective December 2017; \$1,129.10 effective December 2018; and \$1,147.10 effective December 2019. SSA noted on the form that appellant had received disability benefits between May 2008 and April 2010.

On September 18, 2020 OWCP completed a FERS offset calculation form wherein it tabulated the overpayment from June 1, 2006 to September 12, 2020. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period. OWCP related that from June 1, 2006 to November 30, 2006 an overpayment of \$717.32; from December 1, 2006 to November 30, 2007 an overpayment of \$1,478.85; from December 1, 2007 through April 30, 2008 an overpayment of \$629.88; from May 1 to November 30, 2010 an overpayment of \$3,515.48; from December 1, 2010 to November 30, 2011 an overpayment of \$5,996.03; from December 1, 2011 to November 30, 2012 an overpayment of \$6,228.44; from December 1, 2012 to November 30, 2013 an overpayment of \$6,317.31; from December 1, 2013 until November 30, 2014 an overpayment of \$6,411.16; from December 1, 2014 to November 30, 2015 an overpayment of \$6,520.66; from December 1, 2015 to November 30, 2016 an overpayment of \$6,538.53; from December 1, 2016 to November 30, 2017 an overpayment of \$6,539.92; from December 1, 2017 to November 30, 2018 an overpayment of \$6,671.08; from

December 1, 2018 to November 30, 2019 an overpayment of \$6,857.59; and from December 1, 2019 to September 12, 2020 an overpayment of \$5,478.23. OWCP found that the overpayment totaled \$69,900.47.

In a preliminary overpayment determination dated October 8, 2020, OWCP advised appellant of its determination that he received a \$69,900.47 overpayment of compensation for the period June 1, 2006 through September 12, 2020 because his FECA wage-loss compensation benefits had not been reduced by his SSA age-related retirement benefits attributable to federal service. It also made a preliminary determination that he was without fault in the creation of the overpayment. OWCP advised appellant that he could submit evidence challenging the fact or amount of the overpayment or request waiver of recovery of the overpayment. It instructed him to complete an overpayment recovery questionnaire (Form OWCP-20) to determine whether waiver should be granted, and if not, a reasonable repayment schedule. OWCP informed appellant that he should provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It provided an overpayment action request form and notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On November 4, 2020 appellant completed the Form OWCP-20. He requested waiver of recovery of the overpayment because he was found to be without fault in the creation of the overpayment. Appellant reported SSA income of \$2,180.00 and FECA benefits of \$7,474.20, for a total monthly income of \$9,654.02. He listed expenses as: \$849.13 for mortgage; \$1,000.00 for food; \$300.00 for clothing; \$854.15 for utilities; \$2,699.61 for other expenses. Appellant listed other consumer debts paid by monthly installments as totaling \$1,357.96. He listed \$10,859.37 in assets (cash, checking account, savings account, and value of other personal property). Appellant forwarded a number of documents relating to his expenses and noted that he spent money and obtained credit he would not have if he had known he was being overpaid.

By final decision dated May 13, 2021, OWCP found that appellant received an overpayment of compensation in the amount of \$69,900.47 for the period of June 1, 2006 through September 12, 2020, for which he was without fault. It explained that he had reported \$9,654.02 in monthly income, which the evidence of record substantiated consisted of his SSA benefits of \$2,180.00, his wife's benefits of \$599.00, FECA compensation of \$4,379.00, and Department of Veterans Affairs (VA) benefits of \$3,600.12. However, OWCP found that appellant had not substantiated or explained his "other expenses" of \$2,699.61, and that he had reported an excessive \$1,000.00 amount for food expense, thus his food expense was reduced to \$690.00. Therefore, appellant's monthly income of \$9,654.02 exceeded his monthly adjusted expenses of \$4,051.24, by \$5,602.78. OWCP determined that, although appellant was not at fault in the creation of the overpayment, the overpayment could not be waived as appellant's income exceeded his monthly expenses by more than \$50.00, and his asset base also exceeded the allowable threshold of \$10,300.00. It found that there was no evidence to substantiate that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deduction of \$1,800.00 from appellant's continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA³ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁶ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$69,900.47, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period June 1, 2006 through September 12, 2020, without an appropriate offset.

In its May 13, 2021 decision, OWCP found that an overpayment of compensation was created for the period June 1, 2006 through September 12, 2020. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA indicated that appellant received age-related SSA retirement benefits that were attributable to federal service during the period June 1, 2006 through September 12, 2020. It also properly noted that appellant had received disability, rather than age-related SSA benefits from May 1, 2008 to April 30, 2010. Consequently, the fact of overpayment has been established.⁹

³ *Id.*

⁴ *Id.* at § 8102.

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ 5 U.S.C. § 8116(d)(2); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

⁹ *L.M.*, Docket No. 19-1197 (issued January 8, 2020).

To determine the amount of the overpayment, the portion of the SSA benefits that were attributed to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing June 2006. OWCP provided its calculations for each relevant period based on the SSA worksheet and in its October 8, 2020 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period June 1, 2006 through September 12, 2020 and finds that an overpayment of compensation in the amount of \$69,900.47 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹¹

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹² An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³

Section 10.437 of OWCP's implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁴ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ *C.B.*, Docket No. 20-0031 (issued July 27, 2020); *L.S.*, 59 ECAB 350 (2008).

¹² 20 C.F.R. § 10.436. OWCP's procedures provide that the assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) (September 2020).

¹³ Federal (FECA) Procedure Manual, *id.* at Chapter 6.400.4a(3) (September 2020).

¹⁴ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁵

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment. Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses or that his assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics. OWCP procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.¹⁷ Appellant submitted an overpayment recovery questionnaire on November 5, 2017 and a substantial amount of documents relating to his expenses.

OWCP found that appellant's monthly income was \$9,654.02, based upon his and his wife's SSA benefits, his FECA compensation, and his VA benefits. It also found that appellant had not substantiated or described his "other expenses" of \$2,699.61, therefore his verified monthly expenses of \$4,051.24 yielded a monthly surplus amount of \$5,602.78. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁸ As appellant's current income exceed his ordinary and necessary living expenses by more than \$50.00 he does not need substantially all of his income for ordinary and necessary living expenses.¹⁹

Additionally, the evidence of record does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial

¹⁵ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.400.4c(3) (September 2020).

¹⁶ 20 C.F.R. § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁷ *Supra* note 12.

¹⁸ *Id.* at Chapter 6.200.6(a)(1); *see also Desiderio Martinez*, 55 ECAB 336 (2004).

¹⁹ As appellant's income exceeds his ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether his assets exceed the allowable resource base. *See J.W.*, Docket No. 16-1355 (issued January 10, 2017).

hardship attempting to repay the debt.²⁰ He alleged that he would not have spent money and obtained credit if he had known he was being overpaid. To establish that a valuable right has been relinquished, it must be shown that the right was in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.²¹ Because appellant failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, "taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."²² When an individual fails to provide requested information on income, expenses, and assets, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$1,800.00 each 28 days from appellant's continuing compensation payments. The record indicates that appellant's monthly income exceeds his reported monthly expenses by \$5,602.78 per month. OWCP therefore did not abuse its discretion in finding that he should repay the overpayment at the rate of \$1,800.00 per compensation period.²⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$69,900.47, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period June 1, 2006 through September 12, 2020, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and required

²⁰ 20 C.F.R. § 10.437.

²¹ See *Susan L. Flowers*, Docket No. 95-0427 (issued February 25, 1997).

²² 20 C.F.R. § 10.441.

²³ *J.R.*, Docket No. 20-1094 (issued January 5, 2021); *R.O.*, Docket No. 18-0076 (issued August 3, 2018); *Gail M. Roe*, 47 ECAB 268 (1995).

²⁴ *N.B.*, Docket 18-0795 (issued January 4, 2019); *N.S.*, Docket No. 14-2081 (issued February 12, 2015).

recovery of the overpayment by deducting \$1,800.00 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2021 is affirmed.

Issued: April 28, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board